In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1570

ROBERT H. DONNELLY,
PETITIONER,

v.

BENJAMIN A. DeCHRISTOFORO,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinions Below

The opinion of the court below (App. A) is not yet reported. The order of the district court (App. B) is not reported. The opinion of the Massachusetts Supreme Judicial Court (App. C) is reported at 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 100 (1971).

Jurisdiction

The judgment of the court below was entered on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the Fourteenth Amendment to the Constitution?

Constitutional Provision

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

A. *Proceedings in the State Courts*

On May 8, 1967, a Middlesex County grand jury returned two indictments against Respondent Benjamin A. DeChristoforo. Indictment number 77689 charged DeChristoforo with having committed murder in the first degree of one Joseph Lanzi. Indictment number 77690 charged DeChristoforo with illegal possession of a firearm. At respondent's arraignment on November 20, 1968, a plea of not guilty was entered in his behalf at the direction of the court. The trial of respondent commenced on April 22, 1969, and lasted seven days.

The first Commonwealth witness, Patrick Carr, a Med-

ford, Massachusetts police officer, testified that at approximately 4:00 a.m. on April 18, 1967, while accompanying Officer John P. Brady in a police cruiser, he observed an automobile with four occupants and approached it to investigate (Tr. 334-39)[1]; that the operator of the vehicle, one Gagliardi, stepped out as he (the witness) approached (Tr. 339); that a man, later identified as the deceased Lanzi, appeared to be asleep in the front passenger seat of the car with his head slumped back and to the left (Tr. 343); that Frank Oreto and the respondent were in the back seat of the car and that they each conversed with him (the witness) when they got out of the car (Tr. 356-58); that the respondent identified himself with a surname other than "DeChristoforo" (Tr. 359); that the respondent identified the man remaining in the vehicle (Lanzi) as "Johnny Simeone from Boston" (Tr. 359); that the respondent indicated that the man "sleeping" in the front seat had been "involved in a fight in a joint in Revere" and that they (the occupants of the car) were going to take the other occupant (the deceased Lanzi) to a hospital (Tr. 359).

Officer Carr testified further that DeChristoforo walked away from the car while Officer Brady shined a light into the car and reportedly observed a small derringer-type gun on the floor behind the driver's seat and a revolver on the seat where Frank Oreto had been seated previously (Tr. 359-60)[2]; that he (the witness) leaned into the car to examine the supposedly injured man and determined that he was bloody and not breathing; that Officer Brady likewise examined the man and determined that he was dead (Tr. 360-61). Frank Oreto was arrested at the scene (Tr. 361). (On October 26, 1967, Oreto, the only suspect then in custody, pleaded guilty to second degree murder and

[1] "Tr." refers to the State Trial Transcript.

[2] The guns were made exhibits in the case (Tr. 381-83).

illegal possession of a firearm. See 1971 Mass. Adv. Sh. 1708, App. C, p. 40).

On cross-examination Officer Carr testified that DeCristoforo had been seated behind the driver in the automobile and that Oreto had been seated behind the dead man (Tr. 399).

George Katsas, a pathologist, then testified that he had examined the victim's body and had extracted bullets therefrom at approximately 5:30 a.m. on April 18, 1967 (Tr. 457-61); that four bullets had been found in the victim's body (Tr. 465); that in his (the witness') opinion the victim, Lanzi, had died as a result of multiple gunshot wounds in the chest and head which perforated the brain, liver and lungs (Tr. 470); that smoke rings indicated that a gun was held close to, or in contact with, the clothing and body at the time of the shots (Tr. 474); that death had occurred between three and five o'clock in the morning (Tr. 476) and that, in his opinion, the victim had been shot to death in the automobile (Tr. 477).

On cross-examination, the witness testified further that it was his opinion that the body had not been moved after the shooting (Tr. 486).

Officer John P. Brady testified that he was the police officer who was with Officer Carr during the night in question; that he (the witness) saw an automobile go through a red light (Tr. 534); that the car contained four men and that the headlights on the car were off (Tr. 535-38); that he observed Gagliardi get out of the driver's door; that he heard Officer Carr converse with Gagliardi (Tr. 539-40) and that he walked to the rear of the car and heard a conversation between Officer Carr, Frank Oreto and the respondent, DeChristoforo.

William Modugno testified that he lived at 9 Fourth Street in Medford (previously established as in the area where the two police officers questioned the respondent)

and that, on July 25, 1967, he found a revolver buried in the backyard of his home (Tr. 590-91).[3]

Joan Griffin, the sister of the deceased, Joseph Lanzi, testified that she lived in the same building with her brother; that she had supper with him at 6:00 p.m. on the evening of April 17, 1967, and that she next saw his body at the Gaffy Funeral Home on April 18, 1967 (Tr. 606-608).

Walter Dello Russo testified that he was a bartender at the Attic Lounge in Boston; that DeChristoforo was his employer (Tr. 614-16); that Oreto was the manager of the cocktail lounge downstairs but worked in both places (Tr. 617-18); that he (the witness) knew the deceased Lanzi (Tr. 620); and, that both DeChristoforo and Oreto were in the Attic Lounge at two o'clock on the morning of April 18, 1967 (Tr. 624-25).

Susan Morrison, a secretary at Harvard University, testified that she saw DeChristoforo and Gagliardi at the Attic Lounge early in the morning on April 18, 1967 (Tr. 632-35).

William F. Cummings, a Massachusetts State Police ballistician, testified that he had received two weapons from the Medford Police on April 18, 1967, and had examined the same (Tr. 674-78); that he had examined bullets removed from the body of Joseph Lanzi and had performed tests thereon (Tr. 684-85); that, in his opinion, the bullet removed from Lanzi's head had been fired by the revolver that had been found on the back seat of the car (Tr. 688); and that, in his opinion, the three bullets taken from Lanzi's chest cavity had been fired from the gun previously identified as having been found buried in the backyard of William Modugno (Tr. 688, 693-97).

Edmund Flanagan, a special agent for the Federal Bureau of Investigation, testified that pursuant to the issu-

[3] The weapon was introduced as an exhibit (Tr. 597).

ance of an unlawful flight warrant he had been involved in the nationwide search for DeChristoforo following the respondent's disappearance on April 18, 1967, and that DeChristoforo had been arrested finally on November 20, 1968, after an extensive investigation by the Federal Bureau of Investigation (Tr. 724-27).

Dennis M. Condon, also a special agent of the Federal Bureau of Investigation, testified as to his experiences attempting to apprehend Gagliardi, co-defendant of the respondent (Tr. 735-41). The trial judge gave a limiting instruction as to the effect of this testimony (Tr. 736) at the request of respondent's attorney (Tr. 275-77, 722).

Counsel for respondent thereupon proceeded to make an opening statement to the jury. During that address, counsel stated that evidence *would be offered* to show that the respondent had been in the car because it was a rainy night and he needed a ride home (Tr. 760); that evidence *would be offered* to establish that respondent's flight from the authorities could be explained on some ground other than "consciousness of guilt" (Tr. 760-61); that evidence *would be offered* to show that DeChristoforo "was only a passenger in an automobile where an incident took place over which he had no control and had no interest in, other than the death of his close friend" (Tr. 761).

The defense case-in-chief contained *no* evidence supportive of any of the above-cited contentions made by defense counsel in his opening statement.

Nevertheless, defense counsel reiterated in closing argument *his unsupported contentions* that the respondent was in the car simply for the purpose of getting a ride home (Tr. 880) and that the respondent's flight was consistent with something other than consciousness of guilt.

At the close of all of the evidence, while the jury was not present, the respondent's co-defendant, Gagliardi,

pleaded guilty to murder in the second degree (Tr. 851-52). After the jury returned, the court stated:

> Mr. Foreman, and gentlemen of the jury, you have noted that the defendant Gagliardi is not in the dock. He has pleaded 'guilty' and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChristoforo ... (Tr. 851-52).

The trial judge was not requested, at that time, to instruct the jury that Gagliardi's plea should have no effect on its determination of the guilt or innocence of DeChristoforo; no instruction was requested then or given. The fact that the judge advised the jury of Gagliardi's guilty plea and the further fact that respondent's counsel did not request a jury instruction were consistent with respondent counsel's prior attempts to introduce into evidence an exhibit showing that Oreto had already pleaded guilty to the murder of Lanzi and had been sentenced to life imprisonment (Tr. 808, 810-813, 819-822, 825-826). On the question of the admissibility of the Oreto exhibit, respondent's counsel argued to the judge "Well, if the Commonwealth will say [that Oreto pleaded guilty to murder] for the record so that the jury will know it, I will have no quarrel...." (Tr. 820). "If I have an opportunity to prove that [DeChristoforo] didn't personally shoot [Lanzi], at least I can eliminate that from the thinking of the jury." (Tr. 820).

Among other things, respondent's counsel made the following statement in his closing argument:

> There may have been any number of reasons why that man [DeChristoforo] ran away from that place. There was a vicious killing of his friend, and who is to say

that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide with hoodlums, he didn't go out and hide with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there—and I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes (Tr. 888).

... It is my function to attempt to call your attention to such matters that have developed during the course of the trial *as I feel will warrant, justify or require you* to return a verdict of not guilty (Tr. 854).

... What has been offered to get you to start thinking along the lines that Butch [i.e., respondent] and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. *There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will* (Tr. 878-79).

... So that *I think* it's fair to say that the Commonwealth hasn't demonstrated any evidence that would warrant you to even consider the question as to *whether or not DeChristoforo actually pulled the trigger.*

In short, *I think that you would almost be compelled* to come to the conclusion as reasonable people, that he wasn't the killer (Tr. 874).

... When I say that it's serious, *I think it's serious* only because *I think* that it creates doubts in your mind rather than creates affirmative evidence against him (Tr. 876).

> ... [I]f there is a doubt in your mind about that, and *I believe there is, I represent and argue to you* there is, *I ask* you to find him not guilty (Tr. 890) (Emphasis added).

The prosecutor's closing argument followed. He began:

> Let me preface my argument by saying that first of all I am aware that what I say really is an argument because the word "argument" presupposes that I am prejudiced to the cause that I represent, which of course I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it.
>
> I want you to be aware also that I understand completely that my argument is in no way evidence, all it is is an attempt, I suppose, to point out to you those things that I think are important in the case with reference to our responsibility and the burden of proof.
>
> And I realize that my closing argument should be in no way considered by you as any evidence in the case, and I am sure that you won't consider it as that; as I am sure that my opening statement to you is in no way evidence in the case and won't be considered by you as evidence.
>
> I think the important thing for me to say to you right now with reference to the opening I made to you, with reference to what we were going to prove: I hope that if there was anything in that opening that I said to you that we did not prove, that you will disregard what I said about it and only make your

decision on the evidence that we presented to you. I represent to you that whatever I said in the opening I honestly and honorably intended to prove at the time, and I suggest to you that for the most part we have done that without any fear of contradiction.

Let me say by way of getting into my argument that I am aware of what our burdens are in the courtroom, what the Commonwealth's burdens are, what our responsibilities are, and I am aware of the fact that because DeChristoforo has been indicted for the murder and arrested is no evidence of his guilt and I don't ask you to regard it as such. As a matter of fact, you can't. And I realize that our burden is to prove to you beyond any reasonable doubt his guilt." (Tr. 891-93).

The prosecutor then told the jury that the facts indicated that Gagliardi (the driver) shot Lanzi three times in the side and that Oreto shot Lanzi in the back of the head (Tr. 900). The prosecutor argued that DeChristoforo was guilty of murder because he was in the car as a confederate of Gagliardi and Oreto—prepared to assist them in any eventuality (Tr. 913).

During his lengthy closing argument, the prosecutor made the following remarks which have come under attack:

> We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances . . . the defense seems to make some big issue of motive in this case in an attempt, I suppose, to have the jury feel, regardless of what instructions might be given by the court, that an absence of motive in a killing is something that is a detriment to the Commonwealth's case

> and, therefore, you should sort of equate that to reasonable doubt and then acquit him ... (Tr. 894).

No objection to the remark was made. Later, the prosecutor argued:

> I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder ... (Tr. 910).

An objection to the remark was sustained; the court indicated its agreement that the statement had been improper (Tr. 910. See also Tr. 931) 1971 Mass. Adv. Sh. at 1712 (App. C, p. 39). No specific curative instruction was requested immediately; no specific curative instruction was given at that time. [The trial judge later stated that had counsel so requested, he would have given such an instruction (Tr. 931).] Later, arguing to the jury, the prosecutor said:

> I expect that you will return a verdict that is a reflection of the truth. I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way (Tr. 913).

No immediate objection was taken by respondent's counsel to this statement; nor was a specific curative instruction requested at that time. Rather, *on the following morning,* after respondent's counsel had reviewed his copy of the daily transcript, said counsel moved for a mistrial on the ground that the last two remarks quoted above had prejudiced his client. The motion was denied, to which denial

respondent's counsel excepted (Tr. 922). The judge went on to invite respondent's counsel to submit in writing whatever instructions counsel desired the judge to give to the jury in order to counter the alleged prejudicial effect of the prosecutor's remarks (Tr. 923-925).

Counsel for the respondent then wrote out and filed the following specific request for instructions:

> In his closing argument to you, members of the jury, Mr. Irwin the assistant district attorney, stated with reference to the defense:
>
> "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder.
>
> "(a) That statement was improper argument. There is no basis for that statement. The defendant has consistently maintained his innocence by virtue of his plea of not guilty as to any and all charges or accusations made against him.
>
> "(b) As far as you are concerned the defendant is still presumed to be innocent of any and all charges before you.
>
> "(c) You are to totally and completely eliminate from your minds any such suggestion or argument made by Mr. Erwin (sic), insofar as that is humanly possible and if you find that you cannot eliminate that from your consideration of the case then you are to inform the foreman of the fact.
>
> "(d) I ask you now whether there is anyone on the jury who feels he cannot eliminate that from his deliberations and from his consideration of his decision in this case.

> "(e) In again instruct you that you are to disregard that statement made by Mr. Erwin (sic) and consider this case as though no such statement was made."

Immediately prior to the giving of the charge, respondent DeChristoforo exercised his right to make an unsworn statement to the jury (Tr. 933).[4] He stated that he had asked Gagliardi for a ride home; that on the way home an argument broke out of which he had no part; he saw Joseph Lanzi get shot; he couldn't stop it; he was afraid for his life (Tr. 934).

The trial judge proceeded to instruct the jury, at length. The remarks set out below were included in the court's final charge to the jury:

> ... Let me begin this charge by saying to you that, as I have said with regard to unsworn statements, not subject to cross-examination, of the defendant, it is not evidence, nor are arguments of counsel, nor the opening of counsel—whether it be the Assistant District Attorney in this case or whether it be Mr. Smith. It is not evidence for your consideration.
>
> ... The closing arguments, too, Madam and gentlemen of the jury, the counsel very often becomes overzealous. Closing arguments are not evidence for your consideration. Closing arguments, Madam and gentlemen, are merely statements by the respective counsel as to how they hope you will view the evidence which you have heard.

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[4] Allowing a defendant in a capital case to make an unsworn statement to the jury had been a custom of long standing in Massachusetts. *Ferguson* v. *Georgia*, 365 U.S. 570, 586, fn. 17 (1961). A recent opinion of the Supreme Judicial Court, *Commonwealth* v. *O'Brien*, 1971 Mass. Adv. Sh. 1181, 271 N.E.2d 633 (1971), has apparently put an end to this anomalous practice.

> Now, in his closing argument, the District Attorney, I noted, made a statement: "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." There is no evidence of that whatsoever, of course; of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made (Tr. 938-40).

On April 30, 1969, respondent was found guilty of murder in the first degree. It was recommended that the death penalty not be imposed. He was also found guilty of unlawful possession of a firearm (Tr. 1023-24, 1037). A life sentence was imposed as a result of the murder conviction. A sentence of not less than four years, nor more than five years, was imposed for the lesser conviction, to be served concurrently (Tr. 1037).

The respondent appealed to the Massachusetts Supreme Judicial Court, pursuant to Mass. Gen. Laws c. 278, §§ 33A-G. Additionally, respondent moved for a new trial in the Superior Court, claiming the denial of his constitutional rights as set forth herein. The motion was denied and, upon the respondent's exceptions, that denial became part of his appeal.

The Supreme Judicial Court solidly affirmed the judgment of the Superior Court by a majority vote. *Commonwealth* v. *DeChristoforo*, 1971 Mass. Adv. Sh. 1707, 277 N.E. 2d 100, (App. C).

B. *Proceedings in the Federal Courts*

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of

Massachusetts on July 7, 1972. Counsel agreed that no facts were in dispute and introduced into evidence the identical record that had been before the Massachusetts Supreme Judicial Court. By order dated September 27, 1972, the District Court judge denied the petition ruling that "the prosecutor's arguments were not so prejudicial as to deprive [DeChristoforo] of his constitutional rights to a fair trial." (App. B).

On February 22, 1973, by a two to one decision, the United States Court of Appeals for the First Circuit reversed the order of the District Court. (App. A).

Argument

I. When Viewed in the Context of the Entire Trial, the Prosecutor's Closing Argument Did Not So Seriously Prejudice the Respondent That He Was Deprived Thereby of a Fair Trial.

A. *The prosecutor's remarks during closing argument were, at most, statements of personal opinion based upon matters already before the jury and provoked by remarks made by the petitioner's counsel during opening and closing argument.*

The disputed remarks of the prosecutor were, at most statements of personal opinion based on matters already before the jury. For instance, the first disputed statement (Tr. 984) merely voiced a personal opinion as to the gravity of the crime before the jurors. The third disputed statement was to the effect that he (the prosecutor) honestly and sincerely believed that there was no doubt as to the guilt of DeChristoforo. It must be remembered that the evidence of the respondent's guilt included his presence in the car with the victim, his use of a false name, his false

identification of the victim, the false story which he had related to the police, his immediate flight and his prolonged concealment (Tr. 334-61, 724-27). Viewed against the background provided by such formidable evidence of guilt, it is apparent that the prosecutor's reference was, in each case, to the evidence already before the jurors. Similarly, the prosecutor's second disputed statement referred to his opinion as to the trial tactics employed by the respondent's counsel.

In order to understand further the context in which the disputed remarks were made, it is necessary to review the arguments of respondent's counsel which, it is suggested, provoked the disputed remarks. The respondent's counsel repeatedly asserted his own personal opinion. (See Tr. 854, 874, 876, 878-79, 890). Moreover, in his opening statement to the jury, the respondent's counsel stated that evidence would be offered to show that respondent had been in the car only because it was a rainy night and he needed a ride home (Tr. 760). No such evidence was produced. In addition, counsel stated that evidence would be offered to establish that the respondent's flight from authorities could be explained on some ground other than consciousness of guilt (Tr. 760-61). Again, no such evidence was produced. Finally, the respondent's counsel concluded his opening "statement" with the resounding promise that evidence would be offered to show that:

> [T]his man was only a passenger in an automobile where an incident took place over which he had no control and had no interest in other than the death of his close friend... (Tr. 761).

Once again, no such evidence was presented.

Nevertheless, respondent's counsel reiterated in his clos-

ing argument to the jury his contention that DeChristoforo was in the car simply for the purpose of getting a ride home (Tr. 880). In addition, he repeated his earlier unsupported argument that the respondent's flight was consistent with something other than consciousness of guilt. This time, however, he added a possible explanation—

> [T]here may have been any number of reasons why that man ran away from that place. There was a vicious killing of his friend, and who is to say that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide out with hoodlums, he didn't go out and hide out with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there—and *I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes* (Tr. 888) (Emphasis added).

While so arguing, the respondent's counsel particularly stressed the good character of his client (Tr. 878-79) and coupled this contention with the argument that the Commonwealth had not shown any motive to murder the deceased:

> [W]hat has been offered to you to get you to start thinking along the lines that Butch [DeChristoforo] and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. *There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will.*

It is submitted that the above-quoted remarks made by counsel for the respondent in his opening statement and

closing argument were not supported by the evidence and were unethical. By promising that certain crucial evidence would be produced and then never producing the same, counsel used his opening and closing arguments as a substitute for evidence and tried to create the misimpression that "evidence" was available to support his claims. The practice engaged in by respondent's counsel has been soundly condemned. Moreover, when employed by a prosecutor, an opening statement of that character is fatally prejudicial. *Commonwealth* v. *Bearse,* 1970 Mass. Adv. Sh. 1643, 265 N.E.2d 496 (1970).

The disputed remarks of the prosecutor were to a large degree provoked by the remarks of respondent's counsel. Respondent's counsel's argument contended impliedly that, since his client was a man of good character and since the prosecutor had failed to offer evidence to show a motive, his client could not have committed a murder with the degree of malice aforethought required to support a conviction of murder in the first degree. Recognizing the transparent intentions of respondent's counsel, the prosecutor was forced to discuss "motive" as an issue when respondent's counsel well knew that "motive" was not a necessary element of proof. The injection of this non-issue precipitated the prosecutor's second disputed remark—the only remark to which respondent objected.

It is interesting to note that respondent's counsel only made one objection during the prosecutor's closing argument. The record reflects that counsel was well aware of the Massachusetts rule that objection must be made at the time of the remark in question. The next day, in the judge's chambers, when the prosecutor pointed out certain improprieties in respondent's counsel's closing argument, respondent's counsel retorted:

If I made an improper argument, the time to have raised that was at the time I was making it, by objection" (Tr. 927).

B. ***The effect of the prosecutor's remarks, when viewed in the context of the entire case, was not so prejudicial as to require reversal.***

1. ***The entire record of trial must be viewed to determine if the prosecutor's remarks tainted the jury's verdict.***

As noted by the Massachusetts Supreme Judicial Court in a recent opinion, "... it is not every impropriety that occurs in a trial that requires reversal." *Commonwealth* v. *Bottiglio*, 357 Mass. 593, 598 (1970). The overriding standard to be applied in determining whether an impropriety denied a fair trial is "whether the claimed defect influenced the jury and tainted its verdict. If the record demonstrates that it did not, then, the defendant is not entitled to a second trial." *Commonwealth* v. *Bottiglio, supra*, quoting from *People* v. *Kingston*, 8 N.Y.2d 384, 387. A prosecutor's argument must not be "unfair, prejudicial and unwarranted" or so appeal to passion or so abuse the defendant as to warrant the belief that prejudice resulted." *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 27-28 (1923). Of course, it is always expected that opposing counsel will make reasonable objection and exceptions to any improper argument. *Id.*

In making its determination as to the prejudicial effect of the remarks on the verdict of the jury, this Court must view the case in its entirety as the Supreme Judicial Court of Massachusetts took pains to do. See 1971 Mass. Adv. Sh. at 1713, App. C, pp. 45-46.

2. *As a matter of Massachusetts law, the prosecutor's statements were not so improper as to require a reversal of conviction.*

As a matter of Massachusetts law, it is improper for counsel to make statements of personal belief to the jury. *Commonwealth* v. *Cooper,* 264 Mass. 368 (1928); *Commonwealth* v. *Mercier,* 257 Mass. 353, (1926). While the prosecutor's remarks in the instant case were thus improper, (as recognized by the Supreme Judicial Court) they do not warrant reversal of the respondent's conviction, inasmuch as Massachusetts does permit the use of otherwise improper statements by the prosecuting attorney, where provoked by statements made by defense counsel. *Commonwealth* v. *Smith,* 342 Mass. 180 (1961). Thus, where defense counsel directed the attention of the jury to the Commonwealth's failure to produce a prior criminal record of the defendant for impeachment purposes, the prosecutor was permitted to respond that the absence of such a record did not mean that there was no such record. *Commonwealth* v. *Smith, supra;* see also *Commonwealth* v. *Geagan,* 339 Mass. 487 (1959), *cert. denied* 361 U.S. 895 (Prosecutor was permitted to praise the F.B.I. where defense counsel had already strongly criticized it). In *Commonwealth* v. *Perry,* 254 Mass. 520 (1926), the Supreme Judicial Court stated:

> The expressions of personal opinion were an answer to the challenge of the argument for the defendant, they were directed to that argument and they were accompanied by declarations that the jury were to consider the evidence without regard to the opinions and feelings of the speaker.
>
> Language ought not to be permitted which is calculated by abusive epithets, vehement statements of per-

> sonal opinion, or appeals to prejudice, to sweep jurors beyond a fair and calm consideration of the evidence. *Much, however, must be left to the discretion of the judge who has seen and heard the innumerable incidents of a trial where men are contending earnestly.* 254 Mass. at 530-31 (Emphasis added.)

In analyzing the effect of the prosecutor's remarks, particular stress must be placed upon the trial judge's curative instructions to the jury, given during his final charge. It is well settled that improper remarks by counsel may be cured by an appropriate instruction to the jury. *Commonwealth* v. *Balakin*, 356 Mass. 547 (1969); *Commonwealth* v. *Stout*, 356 Mass. 237 (1969); *Commonwealth* v. *Mercier*, 257 Mass. 353 (1926). Such curative instructions have, of course, been utilized and, depending upon the circumstances of the case, been deemed to be adequate, not only in Massachusetts courts but in the federal courts as well. See *Baiocchi* v. *United States*, 333 F.2d 32, 38 (5th Cir. 1964); *Homan* v. *United States*, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866 (1966); *Painten* v. *Commonwealth*, 252 F. Supp. 851 (D. Mass. 1966).

The instructions given by the trial judge in the instant case were completely adequate to remove any residual prejudicial effect of the prosecutor's remarks. The trial judge repeatedly impressed upon the jurors the importance of proof beyond a reasonable doubt and the presumption of innocence (T. 951-59). He was careful to caution the jurors that they were the sole judges of the facts (Tr. 943-45). He gave the following instruction, taken essentially verbatim from the instructions given to the jurors at the time they were being selected:

> It is your sacred duty, madam and gentlemen, to stand between the Commonwealth and this defendant with

> unbending impartiality and unflinching courage in order that the truth may be established and thereby justice obtain (Tr. 949). (See also Tr. 130).

With respect to the remarks made by the prosecutor during his closing argument, the trial judge emphasized that such arguments were not evidence (Tr. 938-40). He explicitly directed the jurors to disregard the prosecutor's second disputed remark and to "[c]onsider the case as though no such statement was made" (Tr. 939-40); this second remark was the only comment which had been objected to immediately by respondent's counsel. On appeal, the Supreme Judicial Court noted that it was quite satisfied with the trial judge's decision to rely on curative instructions to erase any impropriety. The Court held that "[t]he judge adequately guarded the defendant's rights in each instance." 1971 Mass. Adv. Sh. at 1712-1713, App. C, p. 44.

Finally, as the Supreme Judicial Court noted, when counsel for the respondent objected immediately after the prosecutor's second disputed remark, the objection was in effect sustained. *Id.* at 1712. (App. C, p. 44). Later, the trial judge "explicitly stated that he would have given immediate instruction to the jury to disregard the comment if defense counsel had asked for one." *Id.* However, no such motion was made. Additionally, no objection was made immediately after the prosecutor's third disputed remark and no curative instruction was requested at that time.

Therefore, under the law of Massachusetts, it is clear that, although the prosecutor's remarks were improper, when viewed in the context of the entire record, in particular the provocative remarks made by opposing counsel and the curative instructions given by the court, they were not so prejudicial as to require a reversal by the respondent's conviction.

3. ***The Massachusetts courts, by applying the law of Massachusetts in their determination of this issue, did not render the state proceedings fundamentally unfair.***

The Supreme Judicial Court of Massachusetts properly applied the controlling *Massachusetts* law in making its determination as to whether the prejudice allegedly suffered by respondent required reversal of the judgments of conviction. The instant petition presents the question of whether a state court in failing to grant a new trial to a defendant in a state prosecution committed an error of *constitutional* proportions. It has long been recognized that:

> [t]he Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy *and fairness* unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental....
>
> Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to... be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); see also *Coggins* v. *O'Brien*, 188 F.2d 130 (1st Cir. 1951).

The case of *United States ex rel. Castillo* v. *Fay*, 350 F.2d 400 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1019 (1966), is illustrative of a situation wherein this distinction was of central importance. In *Fay*, although determining that certain remarks made by the prosecutor in his summation had been improper, the Second Circuit, nevertheless, held that the state error, if any, in not granting a new trial fell short of constituting a deprivation of due process of law.

Id. See also *Higgins* v. *Wainwright*, 424 F.2d 177 (5th Cir.), *cert. denied*, 400 U.S. 905 (1970); *Downie* v. *Burke*, 408 F.2d 343 (7th Cir. 1969), *cert. denied*, 395 U.S. 940; *Chavez* v. *Dickson*, 280 F.2d 727 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961). The rationale underlying decisions such as *Fay* is readily apparent. While it is highly proper for a federal court to vindicate rights under the federal constitution where it appears that such rights have been abridged, the concept of due process may not be used as a vehicle for imposing federally preferred procedural rules upon state tribunals. See *Snyder* v. *Massachusetts, supra; Coggins* v. *O'Brien, supra; Soulia* v. *O'Brien*, 94 F. Supp. 764 (D. Mass. 1950), *aff'd*, 188 F.2d 233, *cert. denied*, 341 U.S. 928 (1951).

Therefore, absent a strong showing that the requirements of the Due Process Clause of the Fourteenth Amendment require a more stringent review of the ultimate effect of the prosecutor's allegedly prejudicial remarks than was conducted by the highest Massachusetts appellate court, the Supreme Judicial Court opinion should be binding. No such showing has been made.

C. *The First Circuit Court Opinion does not withstand factual analysis and is violative of the principles of comity and federalism that underlie the federal habeas corpus statute.*

Respondent's counsel's trial strategy was to show DeChristoforo to be an "innocent bystander" to a murder. Counsel was careful to mention in his closing that Gagliardi had pleaded guilty to the murder of Lanzi (Tr. 868-69; he also went to great pains to convince the jury that the people pulling the triggers were Gagliardi and Oreto—not DeChristoforo (Tr. 867-875).

The prosecutor in his turn conceded that Gagliardi and Oreto did the shooting (Tr. 900).

How then can the First Circuit Court conclude that the prosecutor attempted to convey to the jury that DeChristoforo had offered to plead guilty but the prosecution had refused the offer. It makes not a whit of sense to accept a plea of guilty from a co-defendant who had shot the victim and refuse a plea from another defendant who admittedly did not shoot the victim. What had been rejected by the Supreme Judicial Court as "subtle inferences" (App. C, p. 46) somehow became convoluted conclusions in the First Circuit Court.

The record before both courts was identical. It consisted of the pleadings and a transcript of all trial court proceedings. No facts were in dispute in either court. In terms of sheer numbers—the respondent received a fair trial. Eight jurists have so held (the trial judge, five judges of the Supreme Judicial Court, the federal district court judge and one Court of Appeals judge). Four judges have disagreed (two judges of the Supreme Judicial Court and two judges of the Federal Court of Appeals). In these circumstances the following question from *Brooks* v. *State of Texas*, 256 F. Supp. 807, 811 (N.D. Texas, 1966) seems singularly apt:

> Five lawyers are of equal rank, each by reputation regarded as a topflight man of the profession. By selection they are called to the bench: Adams as trial judge in the federal court; Baker as trial judge in the state court; Smith, Jones and Brown become members of Court of Criminal Appeals. Toledo is tried and convicted in state court of cattle theft. And standing condemned in the state courts he turns to the federal

> court with a petition for habeas corpus. The federal district judge and the four state judges are equal in knowledge of the law, but Judge Adams says to Toledo, "I will set you free. Judge Baker and these appellate judges cannot peer into the record for the truth as I can. They are not endowed with the legal mind to do so as a federal judge like I can."

No one contends that the Massachusetts Supreme Judicial Court used an incorrect legal standard in determining that DeChristoforo had received a constitutionally fair trial. That Court applied the proper legal principles to the facts before it. Of course, it is recognized that, in a federal habeas corpus proceeding, federal court judges are not bound by conclusions of state courts on questions of federal constitutional law—even where the facts are not in dispute. Nevertheless, the notions of comity and "federalism" that permeate the federal habeas corpus statute would seem to demand that in the circumstances of this case some deference should be given to the opinion of the Supreme Judicial Court. *Cf. United States ex rel. Harris* v. *State of Illinois*, 457 F.2d 191, 197 (7th Cir. 1972). This is certainly the position expressed by Circuit Judge Campbell in his dissent (App. A, p. 35).

But the majority of the First Circuit Court was obviously unwilling to grant any consideration to the opinion of the Supreme Judicial Court. The petitioner suggests that the majority of the First Circuit Court strained in constructing a doubt about the fairness of respondent's trial. And, the petitioner suggests further that the First Circuit Court has ignored the good faith allegiance that state court judges pledge to a vigorous enforcement of the United States Constitution—even in their own courts.

Conclusion

For the reasons stated above, it is respectfully submitted that the question presented for review is substantial, and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Brief:
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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1338

BENJAMIN A. DeCHRISTOFORO,

PETITIONER, APPELLANT,

v.

ROBERT H. DONNELLY,

RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before

ALDRICH, McENTEE and CAMPBELL,
Circuit Judges.

Paul T. Smith, with whom *Harvey R. Peters* and *Jeffrey M. Smith* were on brief, for appellant.

David A. Mills, Assistant Attorney General, Chief, Appellate Section, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *William T. Harrod, III*, were on brief, for appellee.

February 22, 1973

ALDRICH, *Senior Judge.* At four o'clock on the morning of April 18, 1967, the police drew alongside a car that had stopped in a residential area to question the four occupants. The driver, one Gagliardi, was questioned first. He left to enter a house, which he incorrectly asserted to be his own. Petitioner DeChristoforo was questioned next. After he had left the scene, ostensibly to join Gagliardi, the police discovered that the passenger in the front seat was not asleep, as they had been told, but dead. He had been shot in the head by a revolver found on the floor behind him

in front of the fourth passenger, Oreto, and in the left side, next to the driver, by a revolver later found buried in the vicinity. To complete the picture, a fully loaded derringer —a small weapon of low power—was found on the floor in front of the seat behind the driver, where petitioner had been sitting. Further facts, to the extent relevant, will be mentioned later. Others may be found in the opinion of the Supreme Judicial Court dismissing petitioner's appeal. *Commonwealth* v. *DeChristoforo,* 1971 Mass. A.S. 1707.

Petitioner's absence to seek Gagliardi was extended for some fifteen months, when petitioner was discovered to have been living at his grandmother's house. Eventually he, together with Gagliardi, Oreto having previously pleaded to second degree murder and a weapons charge, were brought to trial. At the close of the evidence, in the absence of the jury, Gagliardi pleaded guilty to murder in the second degree. The trial continued and petitioner was found guilty of first-degree murder, but with a recommendation that the death penalty be not imposed. His appeal was submitted to the full Court, but failed by a vote of 5-2. Thereafter petitioner sought a writ of habeas corpus in the district court. The case is here, on the state court transcript, on an appeal from an order dismissing the petition.

We are concerned solely with what petitioner claims was improper closing argument by the prosecuting attorney. The Massachusetts court was unanimous that the argument was improper, but divided on the issue of its prejudicial effect. The objectionable statements fall into two categories: the prosecutor's forceful expression of his personal belief in petitioner's guilt,[1] and his opinion that even petitioner expected a conviction.[2]

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[1] "I honestly and sincerely believe that there is no doubt in this case; none whatsoever."

[2] "I quite frankly think that they [petitioner and his counsel] hope you find him guilty of something a little less than first degree murder."

The impropriety of a prosecutor adding the weight of his personal opinion of a defendant's guilt to the scales of justice is so basic, and so frequently commented upon,[3] that it is difficult today to think that even the most incompetent could do so innocently, unless possibly in a mild form that might be argued to be unintentional. The breach in this case, n.1, ante, was unmistakable and clear. Judicial censure, which might have softened the impact, was neither immediately, nor even ultimately, supplied. The Commonwealth, however, urges us to have in mind that our review is the narrow one of due process, and not the broad exercise of supervisory power that we would possess in regard to our own trial court. We realize this, and we are not surprised that research discloses no authority holding that personal endorsement of his case falling short of suggesting the prosecutor has access to undisclosed evidence, is of sufficient significance to violate due process. While, as the Massachusetts court pointed out, even a mere statement of opinion is unethical, a fact the jury unfortunately

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[3] The Massachusetts court cited, "Am. Bar Assn. Canons of Professional Ethics, Canon 15. *Commonwealth* v. *Mercier*, 257 Mass. 353, 376-77. *Commonwealth* v. *Cooper*, 264 Mass. 368, 374. *Greenberg* v. *United States*, 280 F.2d 472, 474-475 (1st Cir.). *Harris* v. *United States*, 402 F.2d 656, 658-659 (D.C. Cir.)." 1972 Mass. A.S. at 1711. To this we might add *United States* v. *Cotter*, 1 Cir., 1970, 425 F.2d 450. For cases reversing at least partly in reliance on this ground, *see United States* v. *Puco*, 2 Cir., 1971, 436 F.2d 761; *Hall* v. *United States*, 5 Cir., 1969, 419 F.2d 582; *Adams* v. *State*, 1967, 280 Ala. 678, 198 So.2d 255; *People* v. *Alverson*, 1964, 60 Cal.2d 803, 36 Cal. Rptr. 479, 388 P.2d 711; *People* v. *Fuerbach*, 1966, 66 Ill. App. 2d 452, 214 N.E.2d 330; *Wamsley* v. *State*, 1960, 171 Neb. 197, 106 N.W.2d 22; *People* v. *Reimann*, 1943, 266 App. Div. 505, 42 N.Y.S.2d 599. For cases upholding the principle but refusing to reverse on the particular facts, *see United States* v. *Grooms*, 7 Cir., 1972, 454 F.2d 1308; *United States* v. *Jones*, D.C. Cir., 1970, 433 F.2d 1107; *Devine* v. *United States*, 10 Cir., 1968, 403 F.2d 93; *State* v. *Abney*, 1968, 103 Ariz. 294, 440 P.2d 914; *Cokley* v. *People*, 1969, 168 Colo. 52, 449 P.2d 824; *Thomas* v. *Commonwealth*, 1966, 207 Va. 459, 214 N.E.2d 330; *Embry* v. *State*, 1970, 46 Wis. 2d 151, 174 N.W.2d 521.

was not told, at least the jury knows that the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk. We turn, accordingly, to defendant's second complaint, which we regard as more serious.

We have noted that when Gagliardi pleaded guilty and disappeared from the trial the jury was informed of the plea (although not of its precise character).[4] While this may be a questionable practice, the Commonwealth says with some force that the fact of the plea, standing alone, was not detrimental and might even be said to be beneficial to petitioner, particularly where the Commonwealth argued to the jury that Oreto and Gagliardi had been the ones to fire the fatal shots, so that petitioner was, at the most, an accomplice. Fairly obviously, the jury was going to believe that at least one of the persons in the car was guilty of murder. Possibly Gagliardi's plea increased petitioner's chances of being selected out. However, from this perhaps benign, and possibly helpful factor, the prosecuting attorney turned Gagliardi's plea into a telling stroke against petitioner.

A jury must always wonder to some extent why a defendant has not pleaded. When Gagliardi pleaded, drawing its attention to the matter at this important juncture, we may ask what conclusion the jury drew with respect to petitioner. There are only two alternatives. A defendant whose case reaches the jury has either not sought to plead, or he has sought to unsuccessfully. Equally, a jury must

[4] Although it is not vital to the case, the inference that it was a plea to murder in the second degree seems inescapable. In the light of all the evidence and the fact that the victim had been shot three times in the ribs next to Gagliardi, with no significant defense, it would be difficult to think that the Commonwealth would accept a plea of manslaughter. Conversely, the jury could hardly think that Gagliardi would plead, after going through a trial, without some inducement. The most obvious one is the acceptance of a plea to murder in the second degree.

know that if he has not sought to plead, either he did not wish to plead, or he was deterred by the belief that the prosecutor would be unreceptive. In this case it was forcefully brought to its attention that the prosecutor was not unreceptive. What then?

It should require but little sophistication for a jury to realize that any defendant would seek to plead to whatever he considered the minimum possible verdict—there could be nothing to lose by not doing so. In the ordinary case, however, the jury has the full spectrum. Perhaps the defendant's hoped-for minimum is an acquittal. In this event he would not seek to plead. Maybe he is convinced that his best hope is for some intermediate verdict, in which case he would seek to plead to that, but the prosecutor has refused. The jury ordinarily does not know which, but the prosecutor knows, and the jury knows that he knows. Possibly his appraisal of petitioner's hopes could have been regarded as mere (and fair) speculation if offered by someone who was ignorant of the true situation, but the prosecutor was a known insider. Viewed in the abstract, we might have been tempted to make the same observation. In the words of the French playwright, Moliere, "What the devil was he doing in that galley?" (Bartlett, Familiar Quotations (14th ed. 1968) p. 361). The prosecutor, however, was not speaking in the abstract. The question must be, would a jury, wondering whether petitioner was an active participant, or such small fry that the others were indifferent to his presence, be affected by a "frank" remark by one in a position to know what hopes petitioner had revealed to him? We think the answer is yes.

If there can be any doubt about that, (and there were twelve jurors to ponder, and to point out the significance) this is a first degree murder case, the situation was created by a deliberate, and as we shall see, doubly unwarranted, act of the prosecutor, and we believe that fundamental

fairness requires that the doubt be resolved in favor of petitioner.

In discussing, and adopting, this likelihood of the jury's inferring, from the prosecutor's statement, that petitioner had offered to plead, the Massachusetts dissenters stated that there was "nothing to suggest that the defendant or his attorney had at any time negotiated for a guilty plea or conceded the defendant's guilt." 1971 Mass. A.S. at 1720-21. It is our duty, on habeas corpus, not to leave important factual questions unresolved. 28 U.S.C. § 2254; *Fisher* v. *Scafati*, 1 Cir., 1971, 439 F.2d 307, 309. While on the record it seemed to us almost inescapable that petitioner could not have offered to plead, and yet unfair to draw that inference where there had been no finding, we proposed to counsel that they either stipulate to such fact, if there was no disagreement, or return, by order of court, to the district court for further findings.[5] As a result they stipulated as follows,

> "[A]t no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial."

Accordingly we have before us a case where the prosecutor, despite the fact that it was totally untrue, strongly indicated to the jury that the defendant had offered to plead, something which, by the great weight of authority, the jury should not be told even when true.[6]

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[5] In so doing we are not bypassing the important requirement of exhaustion of state remedies. We read the opinion of the Massachusetts court as, inferentially, declining to pursue this subject.

[6] The federal rule forbids the introduction of a withdrawn plea of guilty, *Kerceval* v. *United States*, 1927, 274 U.S. 220, and so do most states. *E.g.*, *Ely* v. *Haugh*, Iowa, 1969, 172 N.W.2d 144; *State* v. *Joyner*, 1955, 228 La. 927, 84 So.2d 462; *People* v. *Street*, 1939, 288 Mich. 406, 284 N.W. 926; *State* v. *Reardon*, 1955, 245 Minn. 509, 73 N.W.2d 192; *People* v. *Spitaleri*, 1961, 9 N.Y.2d 168, 173 N.E.2d 35. *Contra: State* v. *Carta*, 1916, 90 Conn. 79, 96 A. 411; *State* v. *Nichols*, 1949, 167 Kan. 565, 207 P.2d 469

For a prosecutor to convey, or even to permit, a false impression, invades the area of due process. *Miller* v. *Pate*, 1967, 386 U.S. 1; *Hamric* v. *Bailey*, 4 Cir., 1967, 386 F.2d 390. It has been said that the more deliberate the intent, the greater the invasion. *See United States* v. *Mayersohn*, 2 Cir., 1971, 452 F.2d 521, 526; *United States* v. *Keogh*, 2 Cir., 1968, 391 F.2d 138, 146-47. We may now ask how a prosecutor who had given contemplative thought to the matter could honestly believe that a defendant who had seen his co-defendant who had fired the shots allowed to plead to second degree, but made no attempt to plead himself, was risking first degree simply in the hope of getting "something a little less." Whether wisely or not, petitioner must have been hoping for something a lot less. Even if the prosecutor's statement here were to be charged, charitably, to thoughtlessness, in a first degree murder case there must be some duty on a prosecutor to be thoughtful. Moreover, good faith is not determinative. As the

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(dictum); *State* v. *Weekly*, Wash., 1952, 252 P.2d 246. The Massachusetts cases, *e.g.*, *Commonwealth* v. *Devlin*, 1957, 335 Mass. 555, 573, deal with pleas to the maximum offense, and so do not reach the question of compromise. Whether the admission would violate constitutional standards is an open question. *See Hamilton* v. *California*, 1967, 389 U.S. 921. It was so held in *United States ex rel. Spears* v. *Rundle*, E.D.Pa., 1967, 268 F.Supp. 691. The weight of state authority similarly rejects evidence of unaccepted offers to plead. *See*, *e.g.*, *State* v. *McGunn*, 1940, 208 Minn. 349, 294 N.W. 208; *Bennet* v. *Commonwealth*, 1930, 234 Ky. 333, 28 S.W.2d 24. *Contra: State* v. *Christian*, Mo., 1952, 245 S.W.2d 895. Singularly, in this area some federal cases favor admissibility. We find them unpersuasive. Thus in *Moreland* v. *United States*, 10 Cir., 1959, 270 F.2d 887, the court simply stated that while a civil offer of compromise was not an admission of liability, a compromise plea was. In *Christian* v. *United States*, 5 Cir., 1925, 8 F.2d 732, the court found a reason: an offer to compromise a crime was against public policy. The court, of course, lacked the instruction of *North Carolina* v. *Alford*, 1970, 400 U.S. 25, 37-38 (plea may be accepted even though defendant denies guilt). We think the better rule is expressed in *Ecklund* v. *United States*, 6 Cir., 1947, 159 F.2d 81, 84-85. See, also, Amer. Bar Ass'n Standards, Pleas of Guilty § 2.2 and § 3.4; Advisory Committee's Note to Rule 410, Proposed Rules of Evidence for the United States Courts.

Court pointed out in *Brady* v. *Maryland,* 1963, 373 U.S. 83, at 87, (a suppression of favorable evidence case, which the Court construes pari passu with affirmative falsity),

> "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> "The principle of *Mooney* v. *Holohan* [294 U.S. 103] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

See also United States v. *Giglio,* 1972, 405 U.S. 150, 153-54. When the prosecutor added his "frank" statement of petitioner's own position, his personal endorsement of petition's guilt acquired a substantial plus. While we regret to add to the Superior Court's docket, we cannot think that a defendant who never sought to plead and has had the prosecutor, in effect, testify in this manner has had a fair trial, or that the length of his argument, as suggested by Judge CAMPBELL, made the error harmless.

Reversed and remanded for further proceedings consistent herewith.

CAMPBELL, *Circuit Judge* (dissenting).

While the remarks made were improper and might warrant reversal in the exercise of our supervisory powers were this case to be before us upon appeal from a federal district court, I am unable to agree, especially when read in the context of the prosecutor's extended argument, that they were either so meaningful or prejudicial as to amount to error of constitutional proportions. Admittedly the line between fundamental unfairness, in the due process sense, and a more tolerable species of unfairness, is a hard one

to draw, and I can understand the majority's view that, in a capital trial, there is good reason to resolve doubts for the defendant. Nonetheless, I think the inference to be drawn from the prosecutor's remarks is far less obvious than does the majority. As I am persuaded that the petitioner had a substantially fair, if less than perfect, trial, I would deny his petition.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 72-96-G

BENJAMIN A. DECHRISTOFORO,
PETITIONER,
v.
ROBERT H. DONNELLY,
RESPONDENT.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

September 27, 1972

GARRITY, J. Upon consideration of the petition and the Magistrate's memorandum and the briefs of the parties, and after hearing, the court rules that, with respect to the first contention of the petitioner, the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial. With respect to the second contention, viz., that the trial judge's refusal to permit petitioner to inspect the grand jury testimony of officer Carr deprived him of a fair trial, the court finds that the petitioner has not exhausted available state remedies, 28 U.S.C. § 2254(b). *Picard* v. *Connor*, 1971, 404 U.S. 270. The opinion of the Supreme Judicial Court of Massachusetts, in affirming the judgment of conviction against the petitioner, indicated a method whereby petitioner could, by moving in the trial court for a new trial, have presented the Supreme Judicial Court with a record incorporating the relevant grand jury testimony. *Commonwealth* v. *DeChristoforo*, 1971 Mass. Adv. Sh. 1707, 1710-11 n. 2. At oral argument on this petition, counsel for petitioner asserted that, pursuant to this suggestion, he had moved the trial

court for a new trial in an attempt to have the grand jury testimony incorporated into the record; apparently the trial judge, however, merely read the testimony himself and, concluding that its production would not have benefitted the petitioner, he refused to so incorporate the testimony. Our reading of the Supreme Judicial Court's opinion indicates to us that, if petitioner appeals the trial judge's decision, the appellate court may remand the case with a direction that the testimony be incorporated.* Therefore it is ordered that the petition be denied without prejudice to petitioner's rights after exhaustion of available state remedies.

(s) W. Arthur Garrity, Jr.
United States District Judge

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* Cf. *United States* v. *LaVallee*, 2 Cir., 1965, 344 F.2d 313, 315, "It could be argued with some force that when the grand jury testimony is exculpatory and the trial testimony inculpatory, or even when both are inculpatory but so inconsistent as to cast serious doubt on the veracity of the witness, failure to make the grand jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense."

APPENDIX C

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* BENJAMIN A. DE CHRISTOFORO

Middlesex. January 4, 1971. — December 7, 1971.

Present: TAURO, C.J., CUTTER, SPIEGEL, REARDON, QUIRICO, BRAUCHER, & HENNESSEY, JJ.

Practice, Criminal, Disclosure of evidence before grand jury, Argument by prosecutor, Mistrial, Judicial discretion, Charge to jury, Requests, rulings and instructions, Capital case, Fair trial, New trial. *Error*, Whether error harmful. *Constitutional Law*, Due process of law.

Indictments tried in the Superior Court before *Sullivan*, J.

REARDON, J. This is an appeal by the defendant under G. L. c. 278, §§ 33A-33G, from his conviction for first degree murder in the Superior Court. The jury, which unanimously recommended that the death penalty not be imposed, also found the defendant guilty of illegal possession of firearms. The case comes to us on a transcript of the proceedings below, a summary of the record, and the defendant's assignment of errors.

The following facts are undisputed. About 3:55 a.m. on April 18, 1967, a car in which the defendant and three others were riding was stopped in Medford by two police officers. Shortly thereafter the officers discovered that the occupant of the right hand side of the front seat was dead, having been shot once in the right side of the head and three times in the left side of the chest. The officers also discovered an unfired derringer on the floor of the car behind the driver's seat, and a .38 special caliber Smith & Wesson revolver, which had been fired once, on the rear right hand seat. A pathologist later estimated that the

deceased, identified as Joseph Lanzi, died in the car sometime between 3 and 4 a.m. from the wounds described above. The head wound had been inflicted by the Smith & Wesson revolver and the chest wounds by a Harrington & Richardson revolver which was discovered sometime afterward buried in the vicinity of where the car stopped. Before the officers' suspicions were aroused, however, both the defendant, who had been sitting behind the driver in the back seat, and the driver, one Carmen Gagliardi, had left the scene. The other occupant, Frank Oreto, was arrested by the officers after their discovery that the fourth man in the car was dead.

Indictments for murder in the first degree and illegal possession of firearms were returned against Gagliardi, Oreto, and the defendant. On October 26, 1967, Oreto, the only one in custody, pleaded guilty to second degree murder and the gun charges. The defendant, against whom an F.B.I. warrant for unlawful flight was lodged in April, 1967, was apprehended by the F.B.I. in November, 1968, at his grandmother's house, where he had been living continuously since the incident. Gagliardi and the defendant were brought to trial together but only the defendant's case went to the jury. At the conclusion of all the evidence Gagliardi pleaded guilty to second degree murder and the firearms charges, and his pleas were accepted.

The Commonwealth, conceding that it was the other two occupants of the car who fired the actual shots, relied on circumstantial evidence to connect De Christoforo in a joint venture with them to kill Lanzi. Evidence was introduced through Officer Carr, one of the two policemen who stopped the car, that the defendant gave a false name when they asked his identity. He also allegedly told them that the man in the front seat, whom the officers at first thought was asleep, was named "Johnny Simeone," that he had been involved in a fight in Revere and that they

were taking him to the hospital. The defendant's immediate flight from the authorities and subsequent concealment was cited by the prosecution as evidence of guilt.

In addition to efforts to impeach the testimony of Officer Carr, counsel for De Christoforo called only character witnesses and the defendant's grandmother. Although he stated in his opening address to the jury that he intended to prove that the defendant was in the car only because he was being given a ride home from "The Attic," a bar in which he worked, he introduced no evidence to support this theory. He repeated in his closing argument that there were many reasons consistent with innocence to explain the defendant's presence in the car, including his being given a ride home. Similarly, no evidence substantiated the suggestion in the opening that "certain pressures" other than consciousness of guilt explained the defendant's flight and concealment.

We treat with several issues raised by the defendant.

1. The defendant contends it was error to deny his motion to inspect the minutes of the testimony of Officer Carr before the grand jury. Two motions to inspect the grand jury minutes, one with respect to each indictment, were filed before trial and were denied at that time without prejudice to their renewal. During cross-examination of Officer Carr, the defendant renewed his motions with respect to Carr's grand jury testimony and moved in the alternative that the judge make an in camera inspection of the minutes. The judge denied all the motions.

In a number of recent decisions we have held that a judge is not required to grant such motions unless the defendant establishes a "particularized need" to see the grand jury minutes involved. *Commonwealth* v. *Ladetto*, 349 Mass. 237, 244-245. *Commonwealth* v. *Doherty*, 353 Mass. 197, 209-210. *Commonwealth* v. *Carita*, 356 Mass. 132, 141-142. *Dennis* v. *United States*, 384 U.S. 855, 870.

The judge properly applied the rule laid down in these decisions in denying the defendant's motions. Although the defendant contended that in two respects the testimony given by Carr at the trial was inconsistent with prior statements made by him, in neither instance was the alleged prior inconsistent statement claimed to have been made as part of testimony before the grand jury. In one instance the defendant pointed out an inconsistency between Carr's testimony at the trial and his testimony at an earlier probable cause hearing in which Oreto was the defendant.[1] He made full use of this inconsistency in an attempt to impeach Carr's testimony at the trial. In the other instance the defendant claimed an inconsistency between Carr's police report, made shortly after the incident, and his testimony at the trial. As to the events involved in the testimony, Carr's testimony on this point was supported by the unchallenged testimony of Officer Brady who was with Carr when the events occurred. We conclude that there was no inconsistency between Carr's testimony and his report which he clarified at the trial. The defendant did not show that the grand jury minutes would cast further light as to either of the alleged inconsistencies. (compare *Commonwealth* v. *Gordon*, 356 Mass. 598, 602-603) or that the grand jury testimony might be in any other way inconsistent with Carr's testimony at trial. *Commonwealth* v. *Otero*, 356 Mass. 724. In these circumstances there was likewise no need shown for the trial judge to inspect the minutes in camera himself. *Commonwealth* v. *Cook*, 351 Mass. 231, 233. *Commonwealth* v. *Doherty*, 353 Mass. 197, 210.

The defendant urges that we review and reconsider our holdings in the recent cases cited above which require a showing of a "particularized need" before being permitted

[1] At the trial Carr stated that the defendant told him the false story about the dead man in the car, whereas at the probable cause hearing he attributed the story to Oreto.

access to the grand jury testimony of a witness who becomes a witness at the trial of an indictment returned by the grand jury. We recognize the difficult burden which this rule places upon a defendant seeking to impeach such a witness on the basis of inconsistencies between his grand jury testimony and his trial testimony. It may be desirable that we give further consideration to this rule. However, it is not appropriate to do so on the limited record of the case before us.[2] Such a change, if any, might more appropriately be accomplished for prospective application by exercise of the rule making power of this court. In this particular case the defendant is not precluded from seeking relief by way of a motion for a new trial at the hearing on which he may, by proper action, compel the production of Officer Carr's grand jury testimony for determination by the trial judge whether such testimony was in any way inconsistent with his testimony at the trial. *Earl* v. *Commonwealth*, 356 Mass. 181.

2. The defendant moved for a mistrial at the conclusion of the prosecutor's closing argument because of certain remarks in that argument. He claims also that the judge's

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[2] The defendant as the appealing party has the burden of presenting to this court a record on appeal which shows that he was prejudiced by an error committed by the trial court. *Commonwealth* v. *Klangos*, 326 Mass. 690, 691. The record before us contains no portion of the grand jury minutes or any other information concerning the testimony given by Carr before the grand jury. The minutes are not incorporated in the record in any way. There is nothing to indicate that the defendant availed himself of any of the several methods open to him of having the minutes produced in court for marking, identification and incorporation in the record in connection with his exceptions to the denial of his motions with respect to the minutes. We cannot speculate on what the minutes contain or on whether they contain anything which might have been helpful to the defendant. The defendant has not sustained the burden of furnishing us with a record showing that he was prejudiced by the judge's action on his motions to inspect the grand jury minutes and hs alternative motion that the judge inspect the minutes in camera.

instructions to the jury did not adequately cure the prejudicial effect of these remarks.

The defendant is quite justified in objecting to certain portions of the prosecutor's closing argument. It was clearly improper for the prosecutor to state, "They [the defendant and his counsel] said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." It was further improper for the prosecutor to state at another point his personal belief of the guilt of the accused. Am. Bar Assn. Canon of Professional Ethics, Canon 15. *Commonwealth* v. *Mercier*, 257 Mass. 353, 376-377. *Commonwealth* v. *Cooper*, 264 Mass. 368, 374. *Greenberg* v. *United States*, 280 F. 2d 472, 474-475 (1st Cir.). *Harris* v. *United States*, 402 F. 2d 656, 658-659 (D. C. Cir.).

The prosecutor's argument as a whole, however, did not require a mistrial. The judge acted properly within his discretion in denying a mistrial and in relying on curative instructions to erase the error. *Commonwealth* v. *Bellino*, 320 Mass. 635, 644, and cases cited. The judge adequately guarded the defendant's rights in each instance.

Counsel immediately objected to the first statement cited above. Although the transcript at this point is not clear,[3] the judge was later at pains to point out that he recognized at the time that the argument was improper. The record suggests, as the judge said, that his statement to this effect was not heard over defence counsel's expostulation. In addition, the judge explicitly stated later that he would have given immediate instruction to the jury to disregard the comment if defence counsel had asked for one. No such motion was made. In the absence of a suitable request the defendant cannot now successfully argue that an immediate

[3] The transcript shows that the judge was recorded as saying "No" in what we interpret as agreement with defence counsel's statement, "That is not fair argument."

instruction to the jury was necessary to erase the prejudicial effect of the remark. We suggest, however, that in many instances it may be more effective for the judge to give immediate instructions.

After the closing arguments the judge declared his willingness to include in addition to his general charge on closing arguments of both counsel a specific reference to whatever remarks the defendant thought were unduly prejudicial. In adequate compliance with a written request for instructions about this first objectionable remark submitted by counsel for the defendant the judge specifically covered the subject in his charge. Although the language he used was less emphatic than that requested by the defendant, who took exception to it, it was sufficient to safeguard the defendant's rights. *Commonwealth* v. *Devlin*, 335 Mass. 555, 568-569. *Commonwealth* v. *Gordon*, 356 Mass. 598, 604.

Counsel for the defendant did not object at the time to the prosecutor's statement of his personal belief in the guilt of the accused. He did mention it, however, in his motion for a mistrial, and by implication at least requested a specific instruction on it. Nevertheless, his exceptions to the judge's charge were too vague to make clear to the judge that there was objection to the judge's refusal to allude to that comment in particular in accordance with a written request to this effect.[4] Compare *Commonwealth* v. *Cabot*, 241 Mass. 131, 151. In view, however, of our obligation in capital cases to examine the whole case (G.L.

[4] Counsel for the defendant excepted "to the Court's failure to give the requested specific instructions to the jury concerning the statements of the District Attorney in his closing. And, in the alternative, I take an exception to the failure to specifically instruct the jury that the District Attorney's statement, which statement has been discussed with the Court and which is made a part of the record [to the effect that defence counsel hoped the jury would find the defendant guilty of a little less than first degree murder], in the proposed Request for Instructions. [*sic*] Exception is to the refusal to specifically instruct the jury that those statements made by the District Attorney were improper and should be disregarded by them."

c. 278, § 33E), we have considered the effect of this comment in light of the entire proceedings (cf. *Patriarca* v. *United States*, 402 F. 2d 314, 322 [1st Cir.]) and particularly in the light of the judge's general admonition that counsel in their closing arguments "very often become overzealous. Closing arguments are not evidence for your consideration." We feel this instruction was adequate. As the judge pointed out, reminding the jury of an improper remark, no matter what the purpose, might tend to emphasize it.

The defence has contended here that the improper argument was aggravated in its effect because of the jury's knowledge that the codefendant had pleaded guilty. This premise is not valid, because the codefendant's guilty plea was in no way inconsistent with the defendant's presentation of his defence to the jury. Although the defendant did not testify, his attorney represented in his opening and closing statements to the jury that the defendant was in the murder automobile but was there innocently and was in no way involved with the killing. The jury, upon learning of the guilty plea, then knew that at least one other occupant of the vehicle had admitted criminal responsibility for the murder. It is not logical to conclude that the jury would accept any implied argument of the prosecutor that, because one of the men whom the defendant blamed for the murder had pleaded guilty, the defendant was any less firm in his assertion that he himself was not guilty of any crime whatsoever.

The improper argument must also be viewed in relation to the weight of the evidence of the defendant's guilt. The case against the defendant was an extremely strong one. It is not probable that the jury drew from the argument the subtle inferences now suggested by the defence. In any event, the remarks of the prosecutor were insignificant and

harmless as viewed in the context of the great weight of evidence of guilt.

3. Assignments of error based on the judge's failure to give requested instructions are without substance. Three requested instructions dealt with the inference of innocence which the jury must draw from evidence which is consistent with both guilt and innocence. Although they accurately stated relevant law the judge was not required to instruct the jury in the terms urged by the defendant. He adequately covered the substance of the requested instructions. *Commonwealth* v. *Mannos,* 311 Mass. 94, 113. *Commonwealth* v. *Aronson,* 330 Mass. 453, 458. *Commonwealth* v. *Monahan,* 349 Mass. 139, 170-171. He instructed the jury fully and accurately on the presumption of innocence and the burden of proof which the Commonwealth must sustain. He specifically cautioned them not to base their decision on suspicion or conjecture and further instructed them on the proper treatment of circumstantial as opposed to direct evidence in assessing guilt.

A final requested instruction was to the effect that "[f]light does not necessarily reflect feeling of guilt." The judge properly instructed that evidence of the defendant's actions on the scene, his flight, and later concealment, could be taken "as an addition of guilt." He cautioned them in addition, however, that "common fairness insists that before you draw an inference of guilt for the crime of killing, you should be satisfied that these acts or words were at least a part of the motive or cause of the consciousness of guilt which caused these acts or words to be spoken." The defendant could not require more. "Having given the jury correct rules for their guidance . . . [the judge] is not required to go further and discuss possible findings of fact upon which a defendant might be acquitted." *Commonwealth* v. *Greenberg,* 339 Mass. 557, 585. *Commonwealth* v. *Payne,* 307 Mass. 56, 58. In addition, the possibility

that the defendant's flight was prompted by fear rather than guilt had already been suggested in argument to the jury by defence counsel.

4. Four other alleged errors now argued were not raised in the assignment of errors. It is incumbent upon the defendants in capital cases, as in any other kind of case, to file adequate assignments of error according to the procedures provided in G.L. c. 278, §§ 33A-33G. Section 33E of that chapter does not affect the applicability of the other sections in capital cases but only empowers us to order a new trial " 'if satisfied' that because of error of law or of fact the verdict is a miscarriage of justice, or where because of newly discovered evidence or for some other reason justice requires a new trial." *Commonwealth* v. *Bellino*, 320 Mass. 635, 646. We deal briefly with three of these contentions. None of them demonstrates any injustice which would require corrective action by us under § 33E. (a) Four questions were put to a character witness for the defendant on cross-examination. Two questions were excluded. The two questions allowed are not conceded by the Commonwealth to have been improper. Any error, however, was harmless because the questions whether the witness's opinion of the defendant would be detrimentally affected by certain assumed facts about him merely stated the prosecution's theory of the defendant's role in the murder, with which the jury were already familiar. In addition, the witness answered in the negative to both questions.

(b) The judge properly excluded clearly hearsay testimony by the defendant's grandmother about what the defendant said to her when he arrived at her house several hours after the murder.

(c) There is no merit to the contention that the procedure provided in G.L. c. 165, § 2, for having the jury determine in a single verdict both guilt and punishment for first degree murder violates the Fifth and Fourteenth

Amendments to the United States Constitution. The United States Supreme Court has recently resolved this issue in *McGautha* v. *California,* decided with *Crampton* v. *Ohio,* 402 U.S. 183, 208-220, in which the court sustained the constitutionality of a similar Ohio statute.

5. The defendant's final argument stems from the denial of his motion for a new trial. The motion, as amended some six and one-half months after it was originally filed, was based on allegedly newly discovered evidence outlined in four affidavits. Three of these were to the effect that the defendant was in the car on the night of the murder because Gagliardi had offered him a ride home from "The Attic." One of the three, by the defendant's father, also contained an account of an incident which would suggest that the derringer found in the back of the car belonged to Lanzi. That affidavit asserted also that defence witnesses who were to be called to testify to the substance of the affidavits were prevented from testifying at trial by a threatening telephone call made to the defendant's father during the trial. The fourth affidavit, by counsel for the defendant on behalf of a Medford police officer, stated the substance of a conversation with the defendant's father before the defendant was apprehended to the effect that the defendant was hiding only because he was frightened of Gagliardi.

If the evidence described in the affidavits had been offered at trial in admissible form and believed by the jury, this information might well have led to a different result. The opening statement for the defendant indicates that the defence did in fact intend to introduce such evidence. The evidence thus was hardly newly discovered, although the affidavits advance a reason why much of it was not offered at trial. The threatening telephone call, however, does not explain why neither the defendant's father, who stated in his affidavit that he pleaded with the others to

testify despite the call, nor the Medford police officer was called to testify. Nor is there any explanation for the delay of over six and one-half months before defence counsel presented this information to the court. Much of the information stated in the affidavits was hearsay and would not have been admissible in that form in any event.

The motion for a new trial on the ground of newly discovered evidence was addressed to the sound discretion of the trial judge. *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 32-33. *Commonwealth* v. *Sacco*, 255 Mass. 369, 449. *Commonwealth* v. *Devereaux*, 257 Mass. 391, 394-395. *Commonwealth* v. *Chin Kee*, 283 Mass. 248, 257. *Commonwealth* v. *Wallace*, 304 Mass. 680. *Commonwealth* v. *Sheppard*, 313 Mass. 590, 611. *Commonwealth* v. *Coggins*, 324 Mass. 552, 555. *Commonwealth* v. *Robertson*, Mass. .[a] His disposition of it "is not to be reversed unless a survey of the whole case shows that his decision, unless reversed, will result in manifest injustice." "Even if the nature of the evidence is such as to justify a belief that if it had been introduced at the trial the result of the trial would have been different, the judge is not required to grant the motion." *Sharpe, petitioner*, 322 Mass. 441, 444-445. *Commonwealth* v. *Robertson, supra*, at .[b] The 1966 amendment (c. 301) of G.L. c. 278, § 29, to allow the granting of a new trial where it appears to the trial judge that "justice may not have been done" has not altered the nature of our review of his action. *Commonwealth* v. *Stout*, 356 Mass. 237, 242.

The weight and import of the affidavits submitted were likwise for the trial judge's discretion. *Commonwealth* v. *Heffernan*, 350 Mass. 48, 53. He did not have to accept them as true even though they were undisputed. *Commonwealth* v. *Sacco*, 255 Mass. 369, 450. *Commonwealth* v.

[a] Mass. Adv. Sh. (1970) 857, 859.
[b] P. 860.

Millen, 290 Mass. 406, 410. *Commonwealth* v. *Doyle,* 323 Mass. 633, 637. *Commonwealth* v. *Coggins,* 324 Mass. 552, 557. In weighing the new evidence presented he was entitled to make use of his knowledge of what had taken place at the trial (*Commonwealth* v. *Sacco, supra,* at 451; *Commonwealth* v. *Chin Kee,* 283 Mass. 248, 257), and he was not required to give reasons for his action. *Commonwealth* v. *Sacco, supra,* at 450. Finally, there was no requirement that the judge hear oral testimony in support of the affidavits; he was free to choose the procedure by which he would consider the motion. *Commonwealth* v. *Millen, supra,* at 410. *Commonwealth* v. *Coggins, supra,* at 556-557. *Commonwealth* v. *Heffernan, supra,* at 54. In these circumstances the record does not disclose any abuse of discretion in the judge's denial of the motion, which followed oral argument by both sides and the submission of the four affidavits in support of the motion.

6. Acting under G.L. c. 278, § 33E, as amended through St. 1962, c. 453, we have carefully reviewed the evidence. We have done this particularly with a view to testing the defendant's contention unsupported by evidence and referred to principally in the defendant's unsworn statement to the jury that he was in a motor vehicle in the process of being driven home when he was caught up in a situation of murder in which he personally was not involved. Our review indicates that it was open to the jury to return the verdict which they did, and that justice does not require the entry of a verdict of a lesser degree of guilt than that returned by the jury or that there be a new trial.

Judgments affirmed.

Tauro, C. J. (dissenting). After a careful review of the entire record I am unable to agree with the majority opinion that the defendant's constitutional right to a fair trial has

been preserved. I will discuss several of the factors which, in combination, lead me to this decision.[1]

The defendant, over his objection, was tried jointly with a codefendant.[2] The codefendant pleaded guilty (in the absence of the jury) to murder in the second degree at the conclusion of the evidence. The trial then resumed with only the defendant De Christoforo present. The judge stated, "Mr. Foreman, madam and gentlemen of the jury. You will notice that the [co]defendant Gagliardi is not in the dock. He has pleaded 'guilty,' and his case has been disposed of. We will, therefore, go forward with the trial of the case of Commonwealth vs. De Christoforo. The arguments will be held at two o'clock this afternoon."

During the course of the prosecutor's closing arguments to the jury he made certain remarks which are conceded to have been improper.[3] An issue raised by these remarks is whether they were so prejudicial in nature in the circum-

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[1] I disagree also with the majority ruling concerning the defendant's right to inspect the grand jury minutes. I make no further comment on this issue except to express my concurrence with the viewpoint of Spiegel, J., in his dissenting opinion.

[2] There was no abuse of discretion in the denial of the defendant's motion for a separate trial.

[3] THE PROSECUTOR: "I am sure you will have no trouble at all reaching a verdict in this case. I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you will find him guilty of something a little less than first-degree murder." DEFENDANT'S COUNSEL: "I object to that." THE JUDGE: "I don't think—." DEFENDANT'S COUNSEL: "That is not fair argument." THE JUDGE: "No." DEFENDANT'S COUNSEL: "That isn't so." THE PROSECUTOR: "Let's talk about murder in the first degree."

At the hearing on the motion for a mistrial the judge maintained that irrespective of its absence in the official transcription, he had stated, at the time of the improper remarks, in response to the defendant's objection, "No. This is improper argument." However, this statement does not appear in the official transcript of the evidence. See G.L. c. 233, § 80. If the court stenographer did not hear the judge's statement it is reasonable to assume that the jury did not. Moreover, as it will be urged later, if these instructions were in fact given they were far from adequate.

stances of the case as to require a new trial. There are two subdivisions to this issue: 1. Should the judge have immediately instructed the jury at the time the remarks were made? 2. Were the instructions given by the judge to the jury during his general charge sufficient to overcome the prejudicial harm to the defendant? If there exists a reasonable doubt as to the resolution of these questions it must be resolved in favor of the defendant.

In accordance with our statutory authority and responsibilities we must examine improper remarks of the prosecution in the context of the entire case. G.L. c. 278, § 33E.

The jury should have been given explicit instructions that they were to draw no inference as to De Christoforo's innocence or guilt from the elimination of the codefendant from the case. Announcing to the jury merely that the codefendant had pleaded guilty, without more, had the probable effect of leading to surmise and speculation in its deliberation. In such circumstances failing to give explicit instructions diminished significantly the defendant's right to a fair and impartial verdict.

De Christoforo, left as the sole defendant, and without appropriate instruction to the jury, found himself in a precarious position. It was in this setting that the prosecutor made improper remarks in his closing argument to the jury.

As the Supreme Court of the United States has stated, the prosecuting attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88. See *Smith* v. *Commonwealth*, 331 Mass. 585, 591; *People* v. *Talle*, 111 Cal. App. 650, 678-679.

It must be emphasized that the highly prejudicial nature of the prosecutor's statement to the jury can be fully assessed only in context with the fact that the jury already knew that the codefendant had pleaded guilty. The jury had received no clarifying instructions as to this turn of events. In the circumstances, the prosecutor's argument may have left an inference with the jury that both defendants had offered to plead guilty to a lesser charge than first degree murder, and that the district attorney had accepted the codefendant's offer but rejected De Christoforo's offer. Even if the defendant had offered to plead to a lesser offence, this fact would have been inadmissible. Indeed, its admission would constitute fatal error. See *Kercheval* v. *United States*, 274 U.S. 220; *State* v. *Abel*, 320 Mo. 445. In the present case, however, there is nothing to suggest that the defendant of his attorney had at any time negotiated for a guilty plea of conceded the defendant's guilt.

Furthermore, shortly after making the first improper statement, the prosecuting attorney compounded the original impropriety by stating his personal belief as to the guilt of the accused.[4] It is, of course, a well established rule that an attorney may not properly state his personal belief in argument to the jury. *Commonwealth* v. *Cooper*, 264 Mass. 368, 374. *Commonwealth* v. *Sherman*, 294 Mass. 379, 391. See *Betts* v. *Randle*, 236 Mass. 441, 444; *Doherty* v. *Levine*, 278 Mass. 418, 419. As the Court of Appeals for the First Circuit has stated, "To permit counsel to express his per-

[4] "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way."

sonal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing." *Greenberg* v. *United States*, 280 F. 2d 472, 475 (1st Cir.). See *Harris* v. *United States*, 402 F. 2d 656, 657-659 (D.C. Cir.); *Hall* v. *United States*, 419 F. 2d 582, 586 (5th Cir.). The statement by the prosecutor of his personal belief in the defendant's guilt compounded the serious harm resulting from the prosecutor's earlier improper statement, for the statements taken together might lead to an inference that the prosecutor had personal knowledge of the defendant's guilt by reason of the defendant's unsuccessful attempt to plead to a lesser crime. The cumulative effect of the remarks of the prosecutor with no adequate and corrective instructions, coupled with the jury's knowledge without clarifying instructions that the codefendant had pleaded guilty at the close of the evidence, seriously prejudiced the defendant's right to a fair trial.

Moreover, the judge in his final instructions failed to correct the harmful effect of the improper argument. It is the rule of this Commonwealth that the jurors are generally expected to follow instructions to disregard matters withdrawn from their consideration. *Commonwealth* v. *Bellino*, 320 Mass. 635, 645. *Commonwealth* v. *Crehan*, 345 Mass. 609, 613. However, there have been persuasive opinions that correcting instructions cannot overcome serious prejudicial effect. What was stated by Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453, constitutes a practical and realistic appraisal of the situation. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all

practicing lawyers know to be unmitigated fiction." There are circumstances in which the prejudicial effect is of such proportions that it cannot be corrected by instructions to the jury.[5] In *Bruton* v. *United States,* 391 U.S. 123, 135, the court stated: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Moreover, corrective instructions must be sufficiently strong to accomplish the purpose of counteracting the adverse effect of the prejudicial remarks or evidence. *Heina* v. *Broadway Fruit Mkt. Inc.,* 304 Mass. 608, 611. *Commonwealth* v. *Crehan, infra.* See *London* v. *Bay State St. Ry.,* 231 Mass. 480, 485-486; *Stricker* v. *Scott,* 283 Mass. 12, 14-15.

In the instant case, the judge did not instruct the jury at the time the improper argument was made nor did he call for an immediate retraction. See *Commonwealth* v. *Cabot,* 241 Mass. 131. In his final instructions to the jury the trial judge made the routine observation that arguments of counsel are not evidence: "Consider the case as though no such statement was made." In the circumstances of this case the instructions were far from sufficient to overcome the serious damage done. "It was the duty of the judge to emphasize the fact that the argument had been grossly improper; to point out in plain, unmistakable language the particulars in which it was unwarranted and to instruct the jury to cast aside in their deliberations the improper considerations that had been presented to them, using such

[5] Error was found in *Commonwealth* v. *Cabot,* 241 Mass. 131 (that defendant's defence was a technical one), and in *Commonwealth* v. *Domanski,* 332 Mass. 66, 69-70 (that an unfavorable inference should be drawn from the defendant's failure to call witnesses where there was no evidence that the defendant had witnesses he could call). *Worcester Telegram & Gazette, Inc.* v. *Commonwealth,* 354 Mass. 578. *Commonwealth* v. *Gordon,* 356 Mass. 598, 603-604.

clear and cogent language as would correct the obviously harmful effect of the argument. This was not done." *Commonwealth* v. *Cabot*, 241 Mass. 131, 150-151. *London* v. *Bay State St. Ry.*, 231 Mass. 480, 486.

The majority opinion notes that if defence counsel had requested immediate instructions at the time of the improper remarks the judge would have given them and that "[i]n the absence of a suitable request the defendant cannot now successfully argue that an immediate instruction to the jury was necessary to erase the prejudicial effect of the remark." In a capital case where a man's life may be at stake, and in view of the requirements of G.L. c. 278, § 33E (as amended through St. 1962, c. 453), this view of the majority is untenable. The trial judge has the ultimate responsibility (as we have on review) of guaranteeing the defendant a fair trial. In the circumstances of this case it was the judge's obligation immediately, with clear and unmistakable language, to instruct the jury that the prosecutor's arguments were grossly improper. Moreover, he should have ordered their retraction by the prosecutor. Even though defence counsel may not have moved for immediate corrective instructions, his objections to the remarks were sufficient to require immediate action by the judge. The prosecutor's comments were so prejudicial in nature that the judge should have acted sua sponte. In the total circumstances of the case nothing less could have safeguarded the defendant's constitutional rights to a fair trial.

The remarks of the prosecution in this case were far more prejudicial than the newspaper publicity of the defendant's criminal record in the *Crehan* case.[6] The prose-

[6] In *Commonwealth* v. *Crehan*, 345 Mass. 609, during the trial certain newspaper articles implied that each defendant had a criminal record. "On this assumption some action by the judge was required to overcome the possibility of prejudice. The judge recognized this and, rejecting the argument for a mistrial, decided that immediate instructions were not required and that a general caution in the charge

cutor's argument in the instant case pemitted or perhaps even suggested an inference that the defendant had conceded his guilt and was merely hoping for something a little less than a verdict of murder in the first degree. This diminished his chance for a fair trial to a far greater degree than would have the publication in a newspaper of his criminal background. Unlike a newspaper, the prosecutor ostensibly speaks with the authority of his office. The prosecutor's "personal status and his role as a spokesman for the government tend[ed] to give what he . . . [said] the ring of authenticity . . . tend[ing] to impart an implicit stamp of believability." *Hall* v. *United States*, 419 F. 2d 582, 583-584 (5th Cir.). The prosecutor's remarks probably called for a mistrial. In any event the judge's failure to instruct the jury adequately and with sufficient force to eliminate the serious prejudice to the defendant constitutes fatal error. Moreover, the judge's routine final instructions to the jury were far from sufficient to correct the error. By then the defendant's position had so deteriorated that his chances for a fair deliberation of his fate by the jury were virtually eliminated.

For these reasons I believe that the defendant did not receive a fair trial. I would grant a new trial.

SPIEGEL, J. (dissenting). I am in complete accord with the Chief Justice's dissenting opinion. Nevertheless I feel impelled to also state my disagreement with the majority's adherence to the rule requiring the defendant to show a "particularized need" to inspect the grand jury minutes of the testimony of witnesses who testified before the grand jury and who subsequently testified at the trial.

1. The current rule imposes on the defendant a well-nigh intolerable burden, and is thus out of touch with the

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would be adequate." This court further stated, "Postponing any instruction until the charge, however, risked an adverse effect in the interval." Judgments were reversed.

"growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v. *United States,* 384 U.S. 855, 870. In the case at bar for instance, the majority hold that the defendant was not entitled to disclosure because he "did not show that the grand jury minutes would cast further light as to either of the alleged inconsistencies . . . or that the grand jury testimony might be in any other way inconsistent with Carr's testimony at trial." How could the defendant make such a showing, in the absence of an admission by the witness (see, e.g. *Commonwealth* v. *Carita,* 356 Mass. 132, 141-142), without first inspecting the minutes? It is a formidable task confronting a defendant to show a "particularized need," unless perchance he is possessed of supernatural powers. In the case of *Jencks* v. *United States,* 353 U.S. 657,667-668, involving a defendant's request for inspection of written reports of F.B.I. agents concerning events as to which they testified at trial, the court pointed out: "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict . . . the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

This court in *Commonwealth* v. *Cook,* 351 Mass. 231, 233, citing *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, and *Dennis* v. *United States,* 384 U.S. 855, has said that our rule requiring a defendant to show a "particularized need" appears to be the same as the Federal rule. We should recognize, however, that many Federal Courts of Appeals have interpreted the *Dennis* case as implicitly

repudiating the "particularized need" standard.[1] One court in the case of *Cargill* v. *United States,* 381 F. 2d 849, 851-852 (10th Cir. 1967) has said relative to the opinion in the *Dennis* case: "The Court retains the requirement that 'particularized need' be shown in order that the secrecy may be lifted, but hold *in effect* that such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility. Thus the Court as far as cross-examination is concerned has removed most, if not all, of the substance from the particularized need requirement, although it has retained the term. Under this opinion, it appears that the defense is entitled to the grand jury transcript of the witness's testimony when the jury's functions are ended, and when the request is made during the course of trial that it is necessary for the purpose of cross-examining such witness for the above mentioned purposes. The Supreme Court mentions and relies to some extent on the rationale of *Jencks* v. *United States,* 353 U.S. 657 . . . on this point. The Court also states 'that . . . it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling consideration.' "

Three Courts of Appeals have held that once a government witness has testified at trial, the defendant has a right to examine his grand jury testimony on the subjects about which he testified at the trial, unless the government can show special circumstances exist justifying a protective order. *United States* v. *Youngblood,* 379 F. 2d 365, 370

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[1] Since the Supreme Court in the *Dennis* case based its decision upon its supervisory powers over the Federal District Courts and not upon a constitutional right of the accused, we are not compelled to follow it. *Connor* v. *Picard,* 308 F.Supp. 843, 846 (D. Mass. 1970). This case and other Federal cases noted in this dissent are cited not because they are controlling but because I believe that they represent a rule of reason.

(2d Cir. 1967). *United States* v. *Amabile*, 395 F. 2d 47, 53 (7th Cir. 1968). *Harris* v. *United States*, 433 F. 2d 1127, 1128-1129 (D.C. Cir. 1970). The First Circuit Court, in *Schlinsky* v. *United States*, 379 F. 2d 735, 740 (1st Cir. 1967), has said that, in the light of the *Dennis* opinion, "the requirement of 'particularized need' is very easily met. Here, as in [the] *Dennis* [case], it was for cross-examination." But cf. *Walsh* v. *United States*, 371 F. 2d 436 (1st Cir. 1967).

The American Bar Association (Standards Relating to Discovery and Procedure Before Trial, § 2.1 [a] [iii], p. 13 [Approved Draft 1970]) has recommended that the prosecutor be required to disclose those portions of the grand jury minutes containing relevant testimony of persons whom he intends to call as witnesses at the trial. Several State statutes grant defendants similar rights of inspection in advance of trial. E.g. Deering's Cal. Penal Code Ann., § 938.1; Iowa Code Ann., § 772.4; Ky. Rev. Stat., Rules of Criminal Procedure, Rule 5.16 (2); Minn. Stat. Ann., § 628.04; Okla. Stat. Ann., Tit. 22, § 340.

It is true that in certain instances it may be advisable to maintain grand jury secrecy in advance of trial to protect the safety of witnesses. (See, e.g. *Posey* v. *United States*, 416 F. 2d 545 [5th Cir. 1969], the case involving the murder of three civil rights workers near Philadelphia, Mississippi, in June, 1964.) But as courts and commentators have often pointed out, once a witness has testified at trial, the reasons for preserving grand jury secrecy simply fade away. *Commonwealth* v. *Mead*, 12 Gray 167, 170. *State* v. *Faux*, 9 Utah, 2d 350, 353. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 405-406 (dissenting opinion). Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668, 674 (1962). Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 476-477 (1965). As Dean Wigmore (Wigmore, Evidence [McNaughton rev.

1961] § 2362, at p. 736) has said concerning the grand jury witness: "If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce." On the other hand, "if the grand jury testimony is inconsistent with the testimony given at trial, then fair play seems to dictate that the defendant be allowed use of the grand jury minutes for impeachment purposes, unless there is a compelling need for secrecy to protect individuals or in the aid of national security." *United States* v. *Barson*, 434 F. 2d 127, 129-130 (5th Cir. 1970).

Our decisions holding to the "particularized need" standard are of comparatively recent origin. I do not, however, find this a persuasive reason to follow a rule which does not stand the light of logical analysis. The principal of stare decisis is not absolute because no court is infallible. There should be no reluctance to overrule a decision which is wrong, either because it was not sound when originally promulgated or because subsequent events prove it to be wrong.[2]

Footnote 2 of the majority opinion indicates that if the defendant had included the grand jury minutes in the record on appeal, this court could have then determined whether the defendant had been prejudiced by the judge's action in denying the defendant the right to inspect them, or in refusing to read them himself "in camera." I do not believe that a trial judge or an appellate court should con-

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[2] It may be argued that the impact of an abrupt reversal is lessened by an assertion that a court from a date in the future will no longer follow the rule originally enunciated. See, e.g. *Colby* v. *Carney Hosp.*, 356 Mass. 527; *United States* v. *Youngblood*, 379 F. 2d 365, 370 (1967); *United States* v. *Amabile*, 395 F. 2d 47, 53 (7th Cir. 1968). Although I appreciate the validity of such a prospective holding in a civil case, I see no merit whatever in such a theory when a defendant's life or liberty is at stake.

clude that a defendant would not have been able to undermine a witness's credibility by use of the grand jury minutes. This should be the sole privilege of the defendant. "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made *only* by an advocate" (emphasis supplied). *Dennis* v. *United States,* 384 U.S. 855, 875. This is vastly different from the situation where a question has been excluded in direct examination and an offer of proof is before this court. In such an instance, of course, this court could determine that the evidence contained in the offer of proof would not have benefited the defendant. In cross-examination using the grand jury minutes, we have no means of knowing just what questions counsel for the defendant might ask, or what the answers might be, or what benefit the defendant might derive therefrom.

I am of the firm opinion that we should hold that the Commonwealth, after a witness has testified at trial or at any preliminary or voir dire hearing, be required to turn over to the defendant the relevant portion of his grand jury testimony, unless the Commonwealth can demonstrate a compelling need to keep such testimony secret. *Disclosure* facilitates the fact finding process; *secrecy* only inhibits it.

2. Officer Carr testified that the defendant told a false story about the dead man in the car. The Commonwealth introduced this evidence to show consciousness of guilt. Cross-examination of the officer showed that he had previously testified at a probable cause hearing that it was Oreto who told this falsehood. Even if I were inclined to follow the rationale employed by the majority, I would feel obliged to hold that the requisite "particularized need" was established and consequently would be unable to conclude that the judgment in this case should be affirmed. See *Commonwealth* v. *Carita,* 356 Mass. 132, 141-142; *Common-*

wealth v. *Doherty*, 353 Mass. 197, 215-216 (dissenting opinion). Compare *Commonwealth* v. *Kiernan*, 348 Mass. 29, 36.

The Commonwealth should have no interest in convicting an accused on the basis of testimony which has not been as thoroughly impeached as the evidence permits. I see no basis for the apparent assumption by the majority, without having seen the grand jury minutes, that De Christoforo could not benefit from an examination of them because he had "made full use of . . . [an] inconsistency [at an earlier probable cause hearing] . . . to impeach Carr's testimony at the trial." In this area of disclosure of grand jury testimony, the Supreme Court of the United States has said: "There is no justification for relying upon 'assumption.'" *Dennis* v. *United States*, 384 U.S. 855, 874.

In a similar situation, a Federal Court has held that "[i]nconsistent testimony on a crucial issue by the principle prosecution witness demonstrated 'a particularized need' as required by *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 . . . to produce the pertinent grand jury minutes." *Harrell* v. *United States*, 317 F. 2d 580, 581, fn. 5 (D.C. Cir. 1963). There the arresting officer had given several different versions of his seizure of narcotics from the defendant's taxicab. The judge refused to allow the defendant to examine the officer's grand jury testimony, or to do the same himself in camera, apparently on the theory that any possible material inconsistencies would be merely cumulative. The court quite rightly pointed out that "[n]ot having seen the grand jury testimony, the trial judge was in no position even to speculate on what effect its disclosure might have had on Hutcherson's credibility, with him or with the jury. We cannot assume that Hutcherson was so discredited by the disclosed inconsistencies that further discrediting was impossible." *Id.* at 581.

3. I make no pretence of determining the defendant's innocence or guilt. However, I am convinced that he did

not receive a fair trial and thus I would reverse the judgment and set aside the verdict.

Manuel Katz for the defendant.

John F. Mee, Assistant District Attorney, for the Commonwealth.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1570

ROBERT H. DONNELLY,
PETITIONER,

v.

BENJAMIN A. DeCHRISTOFORO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

After a jury trial in the Middlesex Superior Court, respondent was convicted of first-degree murder with a recommendation that the death penalty be not imposed. He was sentenced to life imprisonment. On appeal to the Massachusetts Supreme Judicial Court his conviction was affirmed by a divided Court (Pet. 39-65). Thereafter, re-

spondent sought a writ of habeas corpus in the United States District Court for the District of Massachusetts. From the order denying the petition for writ of habeas corpus (Pet. 37-38), respondent appealed. The Court of Appeals reversed (Pet. 28-36).

None of the issues or arguments raised by petitioner is of general significance and each was thoroughly canvassed and properly decided by the court below.

For the reasons set forth in the opinion of the Court of Appeals (Pet. 28-36) and for the reasons set forth in the dissenting opinion of Chief Justice Tauro of the Massachusetts Supreme Judicial Court (Pet. 51-58), it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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